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Supreme Court, U.S.

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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GENERAL DYNAMICS CORPORATION,
Petitioner,

v.

GLORIA TREVINO, DONALD and EMILY
BLOOMER, MAUREEN DENISHA BOND,
ROBERT and ROSE FITZ, and
ESTHER B. SHELTON,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW BY PETITIONER

1. Whether the Fifth Circuit's decision in *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989), conflicts with *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988) in holding that the "approval" element of the government contractor defense requires proof that a government official performed a policy level "substantive review and evaluation" constituting a discretionary act under the Federal Tort Claims Act.

2. Whether the Fifth Circuit's decision in *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989), conflicts with *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988) in holding that General Dynamics failed to prove the "approval" element of the government contractor defense despite undisputed facts that the government was fully aware of the alleged defects in the product yet chose to use it as designed for thirteen years.

3. Whether the holding by the Fifth Circuit in *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989) that government approval under the government contractor defense can occur only during the design stage, conflicts with the Fourth Circuit's post-*Boyle* decision in *Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946 (4th Cir. 1989) and the several federal circuit court decisions prior to *Boyle* that approval can occur after the design stage where the government subsequently discovers the defects yet chooses to use the product as designed.

QUESTIONS PRESENTED FOR REVIEW BY RESPONDENT

1. Whether the final element of the government contractor defense can be satisfied absent proof that the government had "actual knowledge" of the dangers in the design that were known to the private design contractor.

II

LIST OF PARTIES

Respondents/Appellees/Plaintiffs

- Gloria Trevino Parker, formerly Gloria Trevino, who was the wife of Charles W. Bloomer at the time of his death on January 16, 1982.
- Corinna A. Bloomer and Lliana A. Bloomer, children of Gloria Trevino and Charles W. Bloomer.
- Donald and Emily Bloomer, parents of Charles W. Bloomer.
- Maureen Denisha Bond, who was the wife of Richard David Bond at the time of his death on January 16, 1982.
- Richard Bond, Jr., child of Maureen Denisha Bond and Richard David Bond.
- Robert and Rose Fitz, parents of Rodney Lee Fitz who died on January 16, 1982.
- Esther B. Shelton, mother of Leslie Crawford Shelton who died on January 16, 1982.

Petitioner/Appellant/Defendant

- General Dynamics Corporation.

Appellee/Cross-Defendant

- United States of America.

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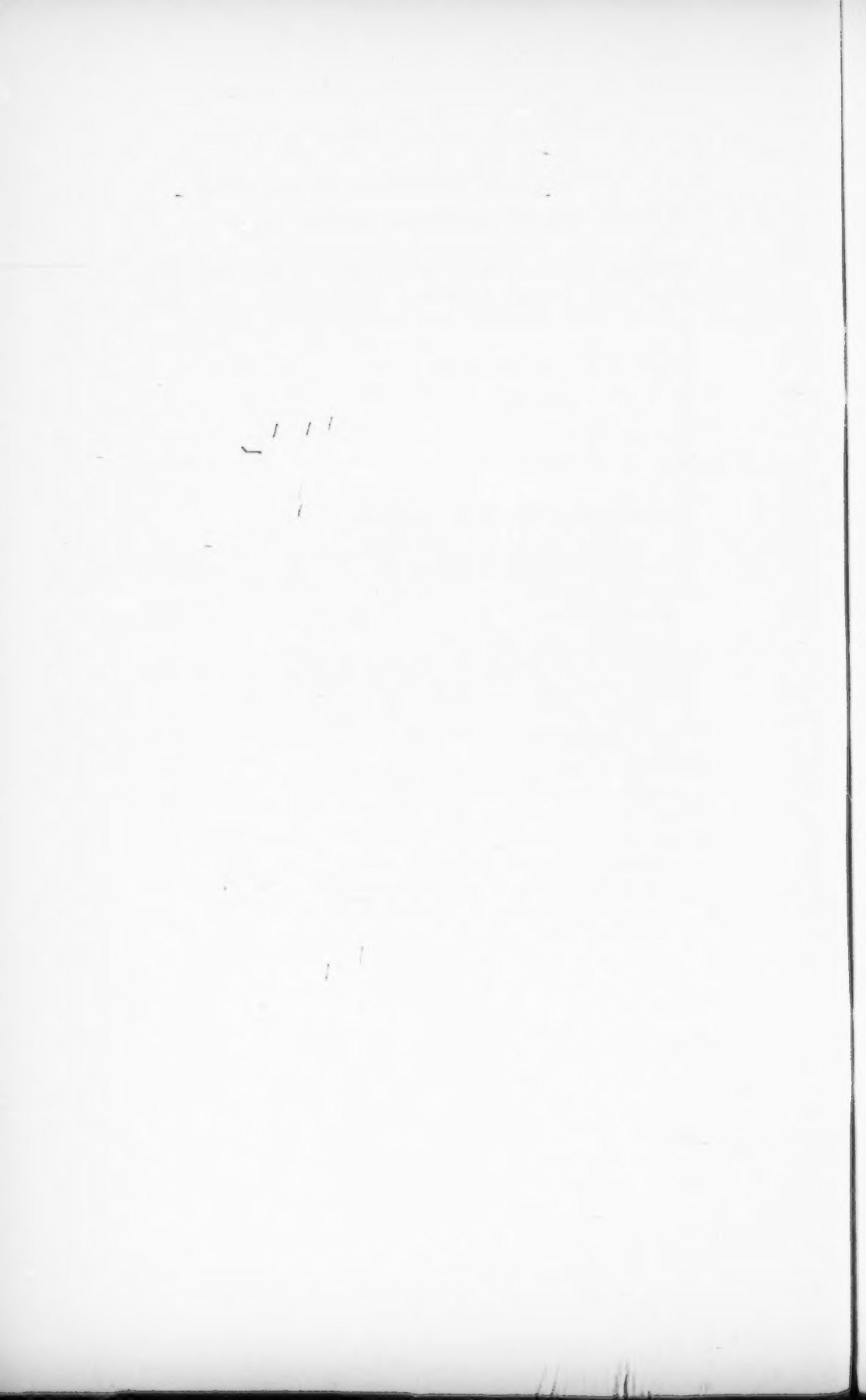
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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the families of four deceased Navy divers—Charles W. Bloomer, Rodney Lee Fitz, Leslie Crawford Shelton, and Richard David Bond—submit this brief in support of their request that certiorari be denied.

STATEMENT OF THE CASE

Respondents believe that the Petitioner's statement contains inaccuracies or omissions. See Sup. Ct. R. 34.2. Respondents offer these clarifications.

1. *The Cause of the Accident.* General Dynamics implies that the cause of the accident was Mr. Bloomer's failure to completely open the ventilation valve. The district court found that General Dynamics' negligence in design and warning caused the vacuum that killed the divers. *Trevino v. General Dynamics*, 626 F. Supp. 1330, 1333 (E.D. Tex. 1986). On appeal, General Dynamics did not challenge the finding that the design was defective. *Trevino v. General Dynamics*, 865 F.2d 1474, 1478 (5th Cir. 1989).

2. *General Dynamics' Status as Designer.* General Dynamics implies that its employees merely "assisted" the Navy in the design of the diving chamber. The record reveals that General Dynamics entered into a series of contracts with the Navy to do all the "engineering effort for the preparation of working drawings." (Pl. Ex. 1, 2); *Trevino*, 626 F. Supp. at 1332. In these contracts, General Dynamics assumed "full responsibility for all technical research," responsibility to review the work for compliance with general requirements, and responsibility "for all quality assurance actions pertaining to the design product . . . including inspection of the end product item before issue." *Id.* Conway Davis, General Dynamics' supervisor at the site, testified that the working drawings at issue were done "one hundred percent by my people" and that the design work was offered to the Navy as a General Dynamics product. (Tr. 711, 712). The working design drawings used for construction of the diving

chamber were affixed with a stamp that read "Initial Issue Of This Plan Developed And Prepared By GEN DYN CORP/E.B. DIV" and signed by three General Dynamics designers. (Pl. Ex. 5, 6, 7, 8, 9, 10). There is a great deal of other evidence and testimony in the record that also reveals that General Dynamics was solely responsible for the defective design that killed the divers. (Pl. Ex. 27, 28, 142; Tr. 134, 194, 210, 215, 232, 233, 234, 259, 272, 274, 291, 298, 303, 305, 306, 309, 312, 338, 343, 392, 414, 470, 475, 510, 511, 707, 711, 712, 723, 728, 745, 746, 747, 748, 750, 758, 761, 831, 832, 838, 842, 986, 994, 1012, 1013, 1014).

3. *The Navy's Specifications.* By omission of language in the lower court opinion, General Dynamics implies that the Navy issued a 339-page circular of requirements (COR) that described the design concept for the diving chamber. The COR represented the requirements for the entire conversion of the GRAYBACK, and only two pages of the COR were devoted to the diving chamber. (Pl. Ex. 38, 39); *Trevino*, 865 F.2d at 1476. These instructions were mere "general performance standards" which left design discretion entirely to General Dynamics. *Id.* at 1486. From these general instructions, General Dynamics produced 71 pages of detailed working drawings. *Id.* at 1477.

4. *The Navy "Approval."* General Dynamics implies that the Navy "approved" the working drawings. Although signatures of Navy personnel appear on the drawings, the evidence revealed that the design was not reviewed. Significantly, a Naval memorandum written in 1969 (13 years before the accident) by Paul Lawrence, the Navy section leader in charge of the hangar flood and drain system design, stated:

Most of the GRAYBACK design work was accomplished by farm-in contractor personnel and not checked by Mare Island experienced technical people.

(Pl. Ex. 28; Tr. 410); *Trevino*, 865 F.2d at 1486; see Appendix A. Further, the final design was never sent to NAVSEA (Naval Sea Systems Command) for approval as required by the COR. (Pl. Ex. 156, p. 78).

5. *The Navy Sea Trials and Subsequent Use*: General Dynamics implies that through sea trials and subsequent use, the Navy approved the design features in question. Although the Navy found that, on occasion, the ventilation valve was difficult to turn, that did not alert the Navy to the specific design defects found to have caused the vacuum that killed the men. Admiral Fowler, commander of NAVSEA, and John Percell, the Naval engineer responsible for certification of the GRAYBACK diving system, each reported that no design review of the GRAYBACK diving system had ever been performed. (Pl. Ex. 41A, 153; Tr. 911); see Appendix B.

REASONS FOR DENIAL OF WRIT

I. CERTIORARI SHOULD BE DENIED SINCE THERE EXISTS NO CONFLICT AMONG COURTS OF APPEALS ON THE ISSUES PRESENTED.

On June 27, 1988, a little over a year ago, this Court issued its opinion in *Boyle v. United Technologies*, 108 S. Ct. 2510 (1988). In that 5-4 decision, authored by Mr. Justice Scalia, the Court first recognized the government contractor defense—a defense that arises from federal common law. *Id.* at 2514, 2518. The Court held that a private contractor is only entitled to the defense if it

can prove (1) that "the United States approved reasonably precise specifications"; (2) that "the equipment conformed to those specifications"; and (3) that "the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* at 2518. General Dynamics contends that the lower court's application of the first element is at issue here.

An analysis of the lower court opinions after *Boyle* reveals that there is no conflict and that the issues raised are not ripe for review. Since the *Boyle* opinion, only three federal courts of appeals have addressed the government contractor defense.

The Fifth Circuit addressed the defense in the opinion below and in three other opinions. *See Smith v. Xerox Corp.*, 866 F.2d 135 (5th Cir. 1989); *Garner v. Santoro*, 865 F.2d 629 (5th Cir. 1989); *McGonigal v. Gearhart Industries, Inc.*, 851 F.2d 774 (5th Cir. 1988). Of course, any conflict in those opinions would be considered an "intramural matter" for the Fifth Circuit and would not warrant this Court's review. Mr. Justice Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Assn. 541, 552 (1958). In its petition for rehearing en banc, General Dynamics contended that a conflict existed among *Trevino* and *Smith* and *Garner*. The Fifth Circuit judges, by an 11-4 vote, rejected that contention and denied en banc review. *Trevino v. General Dynamics*, 876 F.2d 1154 (5th Cir. 1989).

The Eleventh Circuit recently addressed the defense in *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311 (11th Cir. 1989). That opinion cited *Trevino* and applied *Trevino* to the facts there presented. *Id.* at 1320. General

Dynamics does not maintain here that *Trevino* and *Har-duvel* are in conflict.

The only other appellate court to address the defense is the Ninth Circuit. *Ramey v. Martin-Baker Aircraft Co., Ltd.*, 874 F.2d 946 (4th Cir. 1989). Although that opinion was issued after *Trevino*, the Ninth Circuit did not cite *Trevino*, the Ninth Circuit did not seek to distinguish *Trevino*, and the Ninth Circuit did not recognize any conflict with *Trevino*.

Thus, there is no direct conflict with *Trevino*. There is also no implied conflict. Each case turned on its own facts and applied those facts to the elements of the defense.

General Dynamics attempts to manufacture a conflict through its contention that *Ramey* held that "approval can occur after the design stage" while *Trevino* held that "approval can occur only during the design stage." See Questions Presented by Petitioner (3).

Trevino did *not* hold that approval can occur only at the design stage! As the language of the opinion itself reveals, the Fifth Circuit evaluated the very facts that General Dynamics maintains were not considered. *Trevino*, 865 F.2d at 1487 n.13. After a review of the facts that related to the Navy's conduct after the design stage, the Fifth Circuit held:

The Navy had control over the product and had every opportunity to exercise discretion over the design. This the Navy did not do. Both the Navy investigation and the district court faulted the Navy for its *failure* to exercise discretion over the design.

Id. (emphasis in original). Thus, there is no "real and embarrassing conflict of opinion and authority between

the circuit courts of appeal" to warrant this Court's review. *N.L.R.B. v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951); Sup. Ct. R. 17.1.

Moreover, it is evident that these issues are not ripe for this Court's review. Mr. Justice Brennan has noted a policy of the Court not to grant review "until more than two courts of appeal have considered a question." Mr. Justice Brennan, *Some Thoughts on The Supreme Court's Workload*, 66 *Judicature* 230, 233 (Dec.-Jan. 1983).

This policy has marked significance to the issues presented here. *Boyle* created a brand new defense under the federal common law. *Boyle*, 108 S. Ct. at 2514. This Court long ago held that "flexibility and capacity for growth and adaption is the peculiar boast and excellence of the common law." *Hurtado v. California*, 110 U.S. 517, 530 (1884). To revisit the defense, at a time when the circuit courts have barely had an opportunity to consider it, would stifle the growth of the common law.

And, as Mr. Justice Stevens recognized, further consideration by the lower courts will enable this Court to deal with the issues "more wisely at a later date." *McCray v. New York*, 461 U.S. 961, 962 (1983) (Stevens, J., joined by Blackmun, J. & Powell, J.—explanation of denial of certiorari). "It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-18 (1950) (Frankfurter, J.).

Thus, because there is no conflict among the courts of appeals and because the issues are not ripe for review, this Court should deny certiorari.

II. CERTIORARI SHOULD BE DENIED SINCE THERE EXISTS NO CONFLICT BETWEEN TREVINO AND BOYLE.

As Respondents understand Petitioner's argument, *Trevino* is alleged to conflict with *Boyle* because *Trevino* analyzed the first element of the government contractor defense—approval of reasonably precise specifications—under the discretionary function exception to the Federal Torts Claims Act. See 28 U.S.C. § 2680(a).

This analysis does not present a conflict because such was *exactly* the analysis counseled by *Boyle*. In *Boyle*, this Court rejected the *Feres/Stencel* rationale (which had been used by the lower courts in formulation of the defense), and the Court adopted a rationale for the defense based on the discretionary function exception. *Boyle*, 108 S. Ct. at 2517. Specifically, the Court held that the “approval” element assures “that the suit is within the area where the ‘discretionary function’ would be frustrated . . .” *Id.* at 2518.

The petitioner then attacks *Trevino* because, under the discretionary function analysis, the approval element would require proof of a “policy judgment.” It is important to note that this Court used the very same term in rejection of the *Shaw* test. *Boyle*, 108 S. Ct. at 2518. *Shaw* would have required only minimal contractor participation in the design. *Id.* This Court noted that such a rule was not designed “to protect the federal interest embodied in the discretionary function exception.” *Id.* The Court in *Boyle* further explained that “[t]he design selected may well reflect a *significant policy judgment* by Government officials whether or not the contractor rather than those officials developed the design.” *Id.* (emphasis added).

Here, General Dynamics developed the design and there was no evidence that the government exercised any discretion over the design. The fact that the government knew that the ventilation valve was difficult to turn does not trigger government discretion. *Boyle* requires “that the *design feature in question* be considered by a Government officer, and not merely by the contractor itself.” *Id.* (emphasis added).

Under the facts of this case, no government officer considered the design features in question—the design defects that led to the deaths of the four Navy divers. The General Dynamics design was not checked by Naval personnel and no design review of the diving chamber in the GRAYBACK was ever conducted, either during the creation of the design or during the years that preceded the accident. (Pl. Ex. 28, 41A, 153, 156; Tr. 407, 411, 911).

The primary focus of *Trevino* is that “approval” under *Boyle* “requires more than a rubber stamp.” *Trevino*, 865 F.2d at 1480. General Dynamics now agrees with that principle, as have all courts that have considered the issue. *See, e.g., Tozer v. LTV Corp.*, 792 F.2d 403, 408 (4th Cir. 1986), *cert. denied*, 108 S. Ct. 2897 (1988); *Schoenborn v. Boeing*, 769 F.2d 115, 122 (3rd Cir. 1985), *cert. denied sub nom, Eschler v. Boeing Co.*, 465 U.S. 1067 (1985).

However, General Dynamics does not suggest how that “something more” is to be determined, if not by application of the discretionary function exception. It is instructive to note that the lower courts prior to *Trevino*, though based on the *Feres/Stencel* rationale, used much the same language as *Trevino* in explanation of the type

of government approval required. *See, e.g., Boyle v. United Technologies Corp.*, 792 F.2d 413, 414 (4th Cir. 1986) ("reviewed . . . and approved the design"), *vacated and remanded*, 108 S. Ct. 2510 (1988); *Tozer v. LTV Corp.*, 792 F.2d 403, 408 (4th Cir. 1986) ("if there is *genuine* governmental participation in the design, the defense is available"); *Koutsoubus v. Boeing Vertol*, 755 F.2d 352, 355 (3rd Cir. 1985) ("sufficient government participation"), *cert. denied*, 474 U.S. 821 (1985); *Shoenborn v. Boeing*, 769 F.2d 115, 122 (3rd Cir. 1985) ("true government participation in the design"; defense available "so long as government has approved the design after a *substantial review* of the specification").

Finally, the Petitioner attacks *Trevino* for "importing into the government contractor defense the body of law interpreting the discretionary function exception." *See* Petition at 8, 12-18. Petitioner complains that there is "extraordinary tension among the federal circuits regarding the parameters of the discretionary function exception." *See* Petition at 8, n.4. Apparently, the Petitioner wants this Court, in one fell swoop, to resolve all conflicts on the discretionary function exception as well as the imagined conflicts on the government contractor defense.

In any case, it was *Boyle*, and not *Trevino*, that "imported" the discretionary function exception into the government contractor defense. *Boyle*, 108 S. Ct. at 2517. This Court was well aware at the time that it based the defense on the discretionary function exception that the cases that interpreted the exception were imprecise. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984) ("unnecessary—and indeed impossible—to define with

precision every contour of the discretionary function exception"). Yet the Court chose the discretionary function exception as the rationale in *Boyle* to balance the competing interests.

Prior to *Boyle*, many commentators expected the Court to eliminate all uncertainty that surrounded the application of the defense. See, e.g., R. Craft, J. McCarthy & D. Mitzenmacher, *The Government Contractor Defense: A Fair Defense or the Contractor's Shield?* 91 (J. Madole ed. 1986). Instead, this Court only addressed the contours of the defense and left the specific analysis to be resolved by the lower courts. See *Boyle*, 108 S. Ct. at 2518. This Court cannot grant review each time a lower court interprets another aspect of the defense.

The *Trevino* analysis is in harmony with the views of the commentators who have discussed *Boyle*. See, e.g., Comment, *Boyle v. United Technologies Corp.: A Questionable Expansion of the Government Contract Defense*, 23 Georgia L. Rev. 227, 251-52 (1988) ("it may be assumed that the defense will in the future be defined by its underlying rationale of discretionary immunity"). The *Trevino* analysis is in harmony with the views of the Eleventh Circuit. *Harduvel v. General Dynamics*, 878 F.2d 1311, 1315 (11th Cir. 1989) ("discretionary approval"). And, the *Trevino* analysis is in harmony with the views of this Court. *Boyle*, 108 S. Ct. at 2518 ("the discretionary decision").

The Fifth Circuit, in a scholarly and insightful opinion authored by Judge Reavley, and joined by Judges Higginbotham and Smith, followed both the letter and the spirit of *Boyle*. There is no conflict with *Boyle* and, for that reason, certiorari should be denied.

III. CERTIORARI SHOULD BE DENIED SINCE THERE EXIST NO "SPECIAL AND IMPORTANT" REASONS TO GRANT REVIEW.

This Court only grants review to consider "issues of federal law important to the country . . ." Mr. Justice Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 *Judicature* 230, 231 (Dec.-Jan. 1983). Here, there are no "special and important reasons" to grant review. Sup. Ct. R. 17.1.

First, the questions presented by the Petitioner do not present sufficient grounds for review. The questions only ask the Court to decide whether there is a conflict. As the leading commentators on this Court's practice note,

A question whether the decision below is important or is in conflict with some other lower court decision may relate to the reasons for granting the writ, but it is not a question for decision by the Court. The question to put to the Court must concern the substantive issue as to which ruling on the merits is sought.

R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice* § 6.25 at 362 (6th ed. 1986). Here, the Petitioner has not presented a single substantive question for review. Of course, "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court." Sup. Ct. R. 21.1(a).

Second, it is apparent that to resolve the issues presented, this Court will be forced to reexamine the record. As the Court said in *Boyle*, "whether the facts established the conditions for the defense is a question for the jury." *Boyle*, 108 S. Ct. at 2519. Here, General Dynamics asks this Court to make a third review of the lengthy trial

record to find what the lower courts were unable to find—that the government exercised discretion over the design features in question.

This Court has ruled that such fact canvassing is not to be served by a grant of certiorari: “[w]e do not grant a certiorari to review evidence and discuss specific facts.” *United States v. Johnson*, 268 U.S. 220, 227 (1925). Moreover, since this Court sits as a court of law, the Court “cannot undertake to review concurrent findings of facts by two courts below in the absence of a very obvious and exceptional show of error.” *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

The Fifth Circuit in this case correctly applied the *Boyle* principles to the facts. The *Boyle* defense is applied on a case-by-case basis, and the facts are of importance only to the litigants. Thus, there is an insufficient basis for this Court’s review. See *Rudolph v. United States*, 370 U.S. 269, 270 (1962).

Finally, the policies asserted by the Petitioner are not implicated here. General Dynamics claims that to impose liability upon it would result in second-guessing of military judgments and in increased costs to the government. Apparently, under General Dynamics’ logic, anything short of blanket immunity would trigger these same policies.¹

1. Government contractors raise this same “hue and cry” about second-guessing of military judgments and increased costs to the government whenever they are held liable for injuries to innocent victims. The contractors advanced the same arguments before Congress in an effort to pass a bill that would provide them with indemnification (defeated) and in an effort to defeat a bill that required warranties on weapon systems (passed). See Kellman, *Decoupling the Military/Industrial Complex—The Liability of Weapons Makers for Injuries to Servicemen*, 35 Cleve. St. L. Rev. 351, 393-97 (1987) (citing testimony of government contractors).

Trevino, like *Boyle*, will not require second-guessing of military judgments—any more than any suit in which the discretionary function exception is implicated. The critical inquiry is whether the government, in fact, exercised discretion. As *Trevino* points out, “[t]he trier of fact should not evaluate the wisdom or quality of any government decision, but must locate the actual exercise of the discretionary function.” *Trevino*, 865 F.2d at 1480. Here, both lower courts and the Navy itself found that the government had not exercised discretion over the design features in question. *Id.* at 1487 n.13.

Further, there will be no increased costs to the military because of the liability imposed on General Dynamics. As the district court below found, in another context, General Dynamics, as most contractors, is insured for this risk of liability. See Order of December 23, 1986 (unreported, attached as Appendix C). An increase in General Dynamics’ insurance premiums is such a tangential effect that it does not signal important policy concerns. See *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 674 n.8 (1977).

Contrary to Petitioner’s assertions, important public policy concerns are advanced by the opinions in *Boyle* and *Trevino*. The discretionary function analysis will require private contractors and the government to work closely together to design safer, more efficient equipment. See Note, *Extending Immunity to Private Contractors on Government Contracts: Boyle v. United Technologies Corp.*, 4 Brigham Young L. Rev. 835, 842 (1988). Further, the net costs to the government should go down with the inordinate savings in material and human lives. See *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 741-42 (11th Cir. 1985), *cert. denied*, 103 S. Ct. 2896

(1988). If the cost of liability is passed on to the government (such as in manufacturing defect cases or, in cases like this one, where the contractor bears sole responsibility for the defective design), it is better for the government to bear this cost than to have it fall on individual accident victims. *Johnston v. United States*, 568 F. Supp. 351, 357 (D. Kan. 1983).

Moreover, the government contractor defense has always been applied under a "fairness rationale." *Tillett v. J. I. Case Co.*, 756 F.2d 591, 597 (7th Cir. 1985). If the government is truly responsible for the selection of the design, then it is unfair to saddle the contractor with the loss. But where, as here, the private contractor is entrusted with full responsibility for the design—without any exercise of government discretion over the design features in question—and that contractor's defective design kills innocent people, it is equally unfair to allow that contractor to attempt to shift the burden of loss and escape liability. Cf. *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 450-53 (9th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984).

Petitioner argues that *Trevino* creates an "impossible" test for contractors to meet. But, *Trevino*, like *Boyle*, requires only that the government exercise some discretion over the design features at issue. If mere manufacturing or use of equipment with a defective design could satisfy the defense, then private design contractors could never be held responsible for their design defects which cause the death of innocent victims. See *Trevino*, 865 F.2d at 1480-81 n.5. That is not the law, nor should it be. "Federal law provides no defense to the military contractor that mismanufactures military equipment or that

is itself ultimately responsible for the design defect." *Bynum v. FMC Corp.*, 770 F.2d 556, 574 (5th Cir. 1985).

There are no special or important reasons to grant review, and Respondents ask that certiorari be denied.

IV. CERTIORARI SHOULD BE DENIED BECAUSE THE JUDGMENT BELOW WAS CORRECT ON ANOTHER GROUND.

The government contractor bears the burden to prove, by a preponderance of the evidence, all three elements of the government contractor defense. *See McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 453 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). The final element of the defense is that "the supplier warned the United States about the dangers in the use of equipment that were known to the supplier but not to the United States." *Boyle*, 108 S. Ct. at 2518.

A review of the record reveals that General Dynamics did not satisfy this element as a matter of law. Since the element was not satisfied, the defense again fails and the judgment against General Dynamics should be affirmed.²

The evidence was undisputed that General Dynamics knew of the system's potential to create a vacuum.

Conway Davis, General Dynamics' on-site supervisor, testified that "we certainly were aware that if you didn't properly vent this space a vacuum would be created." (Tr. 703, 754). Ralph Draper, General Dynamics' expert

2. Respondents are free to raise any ground, even a ground not relied on by the appellate court, to support the judgment. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

witness at trial, testified that General Dynamics knew, when it drew the main hangar vent value, that a vacuum could exist. (Tr. 982-984).

Further, the evidence was undisputed that the Navy did not have any "actual knowledge" of the system's potential to create a vacuum.

In response to a direct question from the court, John Percell, the Naval engineer who certified the GRAYBACK, testified that "the Navy was not aware that this kind of condition could have existed at that time, Your Honor." (Tr. 900). Chief Wadsworth, the "dry side" supervisor at the time of the accident, testified that there were no specific warnings or instructions of any kind, before the deaths, of the specific danger that a vacuum could be created in the diving chamber. (Tr. 148). The Navy's own reports (Pl. Ex. 27, 40), signed by Admiral Fowler, Commander of NAVSEA, stated that a vacuum condition in the diving chamber was never conceived by the Navy as a possibility. (Tr. 300, 305, 493, 898, 900). John Percell further testified that no "casualty bills" had been prepared because the Navy did not recognize the danger of a vacuum as a possibility. (Tr. 904). Commander Robinson, the GRAYBACK's commanding officer, testified that there was no idea in all the Navy that a vacuum condition could occur as it did in the diving chamber (Tr. 216-17). Dr. Paul Lineaweaver, Naval diving safety expert, testified that there was no way to create a vacuum in other systems so the Navy had no knowledge that a vacuum could occur in this system. (Tr. 490, 493).

There was also undisputed evidence that General Dynamics did not warn the Navy about the diving chamber design's potential to create a vacuum.

Paul Lawrence, the Naval section leader in charge of the hangar flood and drain system design, testified that "General Dynamics did not furnish any warnings saying that a vacuum could be pulled if there was some malfunction of the main hangar vent valve and it didn't fully open while the hanger was being drained." (Tr. 413-14). Mr. Lawrence further testified that had General Dynamics provided a warning, the situation would have been investigated and corrected. (Tr. 414).

It is clear from this record that General Dynamics did not meet its burden to prove that it warned the Navy about the dangers "that were known to the supplier but not to the United States." *Boyle*, 108 S. Ct. at 2518.³

Absent proof that the government had "actual knowledge" of dangers in the design that were known to the contractor, the final element of the defense is not satisfied and the defense must fail. *Id.*; see also *Ramey v. Martin-Baker Aircraft Co., Ltd.*, 874 F.2d 946, 951 (4th Cir. 1989); *Smith v. Xerox Corp.*, 866 F.2d 135, 139 (5th Cir. 1989); *Boyle v. United Technologies Corp.*, 792 F.2d 413, 415 (4th Cir. 1986); *Bynum v. FMC Corp.*, 770 F.2d 556, 575-76 (5th Cir. 1985); *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 354 (3rd Cir. 1985); *Shoenborn v. Boeing*, 769 F.2d 115, 125 (3rd Cir. 1985); *Tillett v. J. I. Case Co.*, 756 F.2d 591, 599 (7th Cir. 1985); *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 451 (9th Cir. 1983).

3. In dicta, *Trevino* indicated that the defects of the design and the dangers of the vacuum were obvious and that the Navy should be "charged" with knowledge of the defect. *Trevino*, 865 F.2d at 1487 n.13.

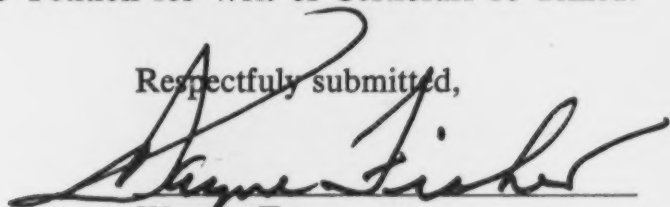
Since the defense fails, the judgment can be affirmed on this ground alone. Where a judgment can be affirmed on another ground, this Court routinely denies plenary review. *See Stern, Supreme Court Practice* § 4.4 at 201 (and cases cited therein).

Thus, Respondents again request that certiorari be denied.

CONCLUSION

For the above reasons, Respondents request that General Dynamics' Petition for Writ of Certiorari be denied.

Respectfully submitted,



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APPENDIX

APPENDIX

Ia

APPENDIX A

SAN FRANCISCO BAY NAVAL SHIPYARD
Vallejo, California 94592

In Reply Refer To:
Code M266/PL:af
5 February 1969

MEMORANDUM

From: Code M263 and Code M266

To: Code M260

Subj: LPSS574 Design and Testing of Piping Passing
Through Watertight Bulkheads, report on

Ref: (a) LPSS574 Detail Specs, Section 9480-0-c.
(b) SSG574 Detail Specs, Section U-9-b.
(c) PDIS 58132 of 27 January 1969
(d) Plan #LPSS574-2099517, Rev. D
(e) Plan #LPSS574-513-4317495, Rev. B
(f) Memo #260F-60 of 7 December 1967
(g) PDIS 55998 of 7 February 1968
(h) PDIS 56419 of 26 April 1968

1. PURPOSE OF REPORT.

During a recent review of piping systems penetrating the pipe/cable trunks between pressure hull and hangars, it became apparent that some new and existing piping systems were not designed to the requirements of references (a) and (b). To correct this design deficiency, references (c) and (d) were issued to provide additional isolation valves in low pressure piping systems. In addition, reference (e) will be issued about 14 February to provide remote operation of two valves in the Port and Stbd hangar lock control bubble. Due to the lateness of this design change, Code M260 requested a written

report as to why this design deficiency was not found and corrected during the early stages of design and plan preparation.

2. BACKGROUND.

a. The GRAYBACK conversion detail specifications, reference (a), and the original building specification, reference (b), require that "piping passing through watertight bulkheads, including the first valve on each side of the bulkhead, shall be designed to withstand the pressure equivalent to the holding depth of the main divisional bulkheads for damage control purposes". During the early stages of design it was found that existing low pressure piping systems on GRAYBACK were not designed to meet this requirement. Reference (f) was issued to request other design piping codes to review specific piping under their cognizance and identify any piping, valves, or fittings that would not withstand the pressure equivalent to the holding depth of the bulkheads. By reference (g) existing low pressure piping systems were tested to further identify piping and components that required replacement. Reference (h) provided the results of this test and recommended corrective action. From the above, it can be seen that all Code M260 piping codes were aware of the specification requirements and initiated the necessary action to correct an existing design deficiency.

b. During the early stages of design, the bulkhead in each hangar at Frame H-19 was being designed for 200 feet. Based on this equivalent pressure, all piping penetrating the bulkhead was of an adequate design. Subsequently, the design depth for this bulkhead was in-

creased to submergence pressure thereby creating a need to redesign the low pressure piping systems. This was not done. The true reasons for this are not known. However, it is reasonable to assume that cognizant personnel in the piping codes were not aware of the change in bulkhead design. One other contributing factor was the fact that original GRAYBACK piping penetrating the pipe/cable trunk was not designed to withstand the design submergence pressure of the hangars. This led engineers to believe that the hangars were excluded from this requirement.

c. The piping bank between the pipe/cable trunk and the hangar bulkheads was originally designed for submergence pressure. This was considered necessary because the piping could be exposed externally to sea pressure when the hangar doors were open while submerged and, from a Sub-Safe standpoint, this piping was considered to be a back-up for the hangar doors. Subsequently, a watertight structure capable of withstanding full submergence pressure was added to completely enclose the piping and to provide a ventilation plenum.

d. The original GRAYBACK hangars did not have divisional watertight bulkheads. It was then reasonable to assume, from a damage control standpoint, that a hangar could be completely flooded without loss of ship, i.e., the large safety tank could be blown to regain neutral or positive buoyancy. Based on this assumption, the bulkhead added at Frame H-19 was not originally considered to be a main divisional bulkhead. Since reference (a) applies to main divisional bulkheads, the increase in design pressures for the piping systems and additional isolation valves was not deemed necessary.

e. After careful consideration it was recently concluded that the hangar bulkheads at Frame H-19 should be considered as main divisional bulkheads. Therefore, the changes to low pressure piping systems indicated by references (f), (g) and (h) should be accomplished. See Figure 1.

3. CONTRIBUTING FACTORS.

a. Several major design changes were made which were not readily apparent to engineers/technicians assigned the responsibility for the affected piping systems.

b. The design work on GRAYBACK was initially given a low work priority due to more important shipyard work. Namely, SSN588, SSBN601, SS567 and SSN579. Due to this extremely heavy workload the piping branches were required to assign less experienced engineers/technicians to GRAYBACK than would normally be assigned. In many cases, farm-in personnel were used to man the GRAYBACK work.

c. The work on GRAYBACK was interrupted on two different occasions. Each time, branch workloads were readjusted to take on new work only to again be directed to resume work on GRAYBACK. This produced extremely heavy work loads in the branches which required a maximum overtime effort and an excessive influx of farm-in people. At one time there were over thirty engineers/technicians assigned to a single section supervisor.

d. Engineers/technicians from various branches were originally assigned the task of preparing specific sections of the conversion specifications. Some of these same

people, who were most knowledgeable on GRAYBACK requirements, were later loaned out by direction to other shipyard groups. Other engineers/technicians were removed from GRAYBACK when design work was stopped and could not be reassigned to GRAYBACK when work started due to other important work assignments.

e. Most of GRAYBACK design work was accomplished by farm-in contractor personnel and not checked by Mare Island experienced technical people.

4. PERSONNEL RESPONSIBLE FOR SUBJECT DESIGN DEFICIENCY.

a. In addition to Branch and Section Supervisors, the following personnel were assigned Lead Engineer or Squad Leader responsibilities for work in this area. It should be noted that no one engineer or squad leader assigned these responsibilities remained in charge from the start of GRAYBACK design to completion of project:

Code M263 Area

W. Montgomery
E. Fujimoto
C. Watson
G. White

Code M266 Area

R. Mendenhall
T. Szafraniec
S. Gladych

Most of the plan work was accomplished by technicians/draftsmen farmed-in by private contractors.

5. RECOMMENDATIONS:

From the unfortunate experiences encountered on GRAYBACK, the Design Division should certainly take steps to prevent reoccurrence of these time-consuming and costly mistakes. One of the most obvious situations that should be avoided whenever possible, is the disruption and confusion caused by stopping and starting a design program. Coupled with this is the resultant loss of experienced talent to other projects. The timely and orderly completion of a design project such as GRAYBACK cannot be accomplished when the various responsible people from numerous branches are scattered all over the shipyard. A design project such as this should be accomplished by assigning the personnel from the branches to a Program Manager and locating these people together in the same area. Planning and Estimating personnel should also be assigned to this group to assist in material procurement problems. These people should then be permitted to work on only the project assigned and not required to perform other tasks.

/s/ F. A. ELLIS
F. A. Ellis

/s/ P. R. LAWRENCE
P. R. Lawrence

Copy to:
M263
M266

APPENDIX B

UNCLASSIFIED

DEPARTMENT OF THE NAVY
Naval Sea Systems Command
Washington, D.C. 20352

In Reply Refer To
C114

5 May, 1983

**UNCLASSIFIED—(Unclassified Upon Removal of
Exhibits 75, 76, 106 and 117
and enclosure (6))**

**SIXTH ENDORSEMENT on Captain David R. OLIVER
Jr., USN, investigation report of
28 Jan. 1982**

From: Commander, Naval Sea Systems Command
To: Judge Advocate General
Via: (1) Chief of Naval Material
(2) Chief of Naval Operations
Subj: Formal investigation to inquire into the circumstances surrounding the personnel casualties incident to the recovery of divers aboard USS GRAYBACK (SS 574) on 16 January 1982.
Ref: (f) NAVMAT P-9290 Systems Certification Procedures and Criteria Manual for Deep Submergence System.
Encl: (10) NAVSEA ltr SEA 921R1/DWJ Ser 270 of 9 Mar. 1982.
(11) NAVSEA Analysis of Design Deficiencies, Material Defects and Unsound Operating Procedures.

1. CNO, by the fourth endorsement, noted that a combination of design deficiencies, material defects, unsound operating procedures and personnel error were identified as contributors to the diving accident. Inasmuch as the first three of these items are within the scope of the Deep Submergence Systems Certification process, the Chief of Naval Material was requested to review and comment on the subject investigation. By the fifth endorsement, the Chief of Naval Material assigned this request to NAVSEA.

2. NAVSEA has conducted a review of the identified design deficiencies, material defects and unsound operating procedures, and both the system certification process and the execution of that process as it relates to the certification of USS GRAYBACK.

3. The recompression chamber and diving system in USS GRAYBACK have been operational since 1969. The complete diving system was certified in 1973 and recertified in late 1980. Subsequent to the subject incident, the NAVSEA System Certification Authority, on 22-25 February 1982, 24-28 May 1982, and again on 4-5 October 1982, conducted on-site surveys of USS GRAYBACK diving system and recompression chamber. The survey teams reviewed all systems contained in GRAYBACK Scope of Certification. The findings of the survey teams are addressed in enclosure (10), and included requirements for design changes and revisions to operating procedures. The design changes that were identified increase the margin of safety and reduce the probability of an operator error which might result in death or injury to diving system or recompression chamber occupants. Enclosure (11) explicitly addresses the design deficiencies,

material defects and unsound operating procedures noted by the second endorsement.

4. Conclusions regarding the certification process requirements and execution as applied to USS GRAYBACK diving systems are as follows:

a. A formal design review of the diving system was not conducted during the initial certification in 1973.

(1) USS GRAYBACK was converted and the diving system installed in 1969. No certification requirements for this system were in existence and the system was placed in operation without formal certification.

(2) CNO requested by letter OP-233C/jad Ser 138P23 of 15 Dec 1972 that NAVMAT develop a plan for the material certification of Navy shipboard hyperbaric facilities.

(3) The certification process for USS GRAYBACK was accomplished using NAVSHIPS 0900-28-2010 as a guide. NAVSHIPS 0900-028-2010 was written to cover manned non-combatant submersibles. This document did not require a detailed design review although such a review was suggested. The governing document for the certification process which should have been used is NAVSHIPS 0994-007-7010 of May 1970, which required a design review.

(4) A formal design review was not conducted, instead reliance was placed on the satisfactory operational history of the diving system between 1969 and 1972 when USS GRAYBACK entered overhaul and on proper maintenance of the system, quality control records, and procedures. There are numerous other older diving systems

and recompression chambers similarly certified without a formal design review.

(5) It is unlikely that a design review would have recognized the basic cause of the incident in USS GRAYBACK, the drawing of a vacuum in the diving chamber through improper operation of the system. However, a detailed design review would have enhanced the formality of the certification process and provided an independent assessment of the design and operation of the system.

b. An error was made during certification of the system in 1980, the certification in effect at the time of the incident. Follow-up of correction of all identified pre-certification audit survey deficiencies was not completed prior to granting certification. Revisions to operating procedures identified under Findings of Fact 28.c and 28.d of the investigation report were not resubmitted by COMSUBPAC to NAVSEA and approved, as required by NAVSEA letter Ser 1809 of 14 July 1980.

5. NAVSEA is taking action to complete formal design reviews of all diving systems and to recommend these reviews be added to NAVMAT-P-9290 as a requirement. NAVMAT-P-9290 will also be revised to identify drawing of a vacuum as a potential hazard which must be considered in reviews of hyperbaric diving facilities. Administrative or disciplinary action will be taken regarding the personnel error that allowed certification to be issued with a portion of a Category 1A audit card incomplete.

6. Concerning the CINCPACFLT request in paragraph 6 of the third endorsement, NAVSEA has determined that a potential does exist in other certified hyperbaric diving systems to develop pressures of less than one atmosphere. These systems are under review, and pro-

11a

cedural and design changes are being developed to account for this situation.

/s/ E. B. FOWLER
E. B. Fowler

Copy to:

CINCPACFLT

COMSEVENTHFLT

COMNAVSURFPAC

COMSUBPAC

CNET

COMTRAPAC

COMSUBGRU SEVEN/CTF SEVEN FOUR

COMNAVMIIPERSCOM (NMPC-82)

COMNAVSAFECEN

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION**

CAUSE NO. B-83-573-CA

GLORIA TREVINO, et al.

v.

GENERAL DYNAMICS CORPORATION, et al.

(Filed December 23, 1986)

ORDER

Now comes the Court, upon consideration of the the question of whether the United States of America is required to indemnify General Dynamics Corporation for any non insured liabilities to plaintiffs, and enters the following ORDER:

FINDINGS

I. This Court has jurisdiction to determine the question of indemnity and the motion of the United States for a stay of this Court's ruling on indemnification until after General Dynamics obtains a ruling from an auditor or contracting officer under Government Cost Accounting Standards is denied.

II. Nothing in this Order or these findings and conclusions precludes the United States from auditing or disallowing the funds General Dynamics has recovered from the U.S. as attorney's fees associated with the

litigation of this action. The recovery of these fees resulted from General Dynamics including the fees as overhead costs under the current contract between the U.S. and General Dynamics Electric Boat Division. The Court expresses no opinion as to whether the reimbursement of these fees under the Electric Boat Division contract is proper or improper.

III. This Court, in Orders dated September 25, 1985 and February 3, 1986, ruled that the indemnity clause (clause 21) of the contracts entered into by General Dynamics and the United States of America was valid and enforceable and that General Dynamics was entitled to indemnification according to the terms and requirements of the contract as a matter of law.

IV. The contractual agreements between General Dynamics and the United States provided that "the Contractor may, with the approval of the [the Department] maintain a self-insurance program." [Clause 21(a)] The contracts also state that the U.S. must indemnify General Dynamics for death or bodily injury to a third person if General Dynamics is not compensated by insurance or otherwise except when the "... contractor has failed to insure as required or maintain insurance as approved by [the Department]." [Clause 21(c)]

V. General Dynamics entered into an insurance policy contract, number ISL G0002755, with the Insurance Company of North America (INA) for the policy year of July 1, 1981 through July 1, 1982; the period covering the incident which precipitated this lawsuit. The contract agreement provided for liability coverage in the amount of \$2,000,000.00 per occurrence with an aggregate limit of \$4,000,000.00. The contractual arrangement also pro-

vided for a \$2,000,000.00 deductible per occurrence with a \$4,000,000.00 aggregate deductible. In other words, this "fronting policy" resulted in the self insurance by General Dynamics for any loss below \$4,000,000.00. Despite being in a position to purchase adequate insurance for the benefit of the Government, which had been obtained at reasonable costs in prior and subsequent years, General Dynamics unilaterally elected in that policy year to bear the risk and self insured itself without the approval of the United States Government.

VI. General Dynamics entered into an insurance policy contract for the same period, number PY036981, with Lloyds Underwriters of London, England which insured General Dynamics for any liability losses in excess of \$4,000,000.00.

VI. The policy with Lloyds also provided that General Dynamics was insured for any amount over \$500,000.00 per occurrence "where there is not concurrent Underlying Insurance" up to \$6,000,000.00 per occurrence with an aggregate limit of \$6,000,000.00.

VIII. For the purposes of determining the applicability and effect of the insurance policies in question for the accident which precipitated this lawsuit, the death of four seamen aboard the U.S.S. Grayback, constituted one occurrence.

VII. General Dynamics was self insured up to \$2,000,000.00 per occurrence and \$4,000,000.00 in aggregate by the utilization of a deductible clause that equated to the face value of the coverage with INA.

VIII. General Dynamics was self insured without United States Government approval in accordance with Clause 21 of the contract and the Federal Acquisition

Regulations, 48 C.F.R. and General Dynamics never utilized the required procedure to seek approval to maintain a self insurance program.

RULING

From the standpoint of the United States, General Dynamics is considered to be insured and therefore, the indemnity clause of the contracts do not operate; the United States Government is not required to indemnify General Dynamics for any liabilities adjudicated against General Dynamics as a result of this lawsuit.

Signed this 23rd day of December, 1986.

/s/ ROBERT M. PARKER
Robert M. Parker
United States District Judge